

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

State of Ohio, Department of Rehabilitation and Correction,
Ross Correctional Institution,

Respondent.

Case No. 98-ULP-03-0122

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
February 11, 1999.

On March 18, 1998, Jacquelyn D. Taylor filed an unfair labor practice charge against the State of Ohio, Department of Rehabilitation and Correction, Ross Correctional Institution ("Respondent"). On May 28, 1998, the State Employment Relations Board ("Board") determined that probable cause existed to believe that the Respondent had committed or was committing an unfair labor practice by denying an employee access to union representation and by providing the employee with a negative performance evaluation in violation of Ohio Revised Code Sections 4117.11(A)(1) and (A)(3).

On September 1, 1998, an evidentiary hearing was held. The parties filed posthearing briefs. On October 30, 1998, the Hearing Officer's Proposed Order was issued, recommending that the Board dismiss the complaint and dismiss with prejudice the unfair labor practice charge. On November 23, 1998, the Complainant filed exceptions to the proposed order. On November 24, 1998, the Respondent filed a response to the exceptions.

After reviewing the record and all filings, including the exceptions and response filed by the parties, the Board adopts the Findings of Fact and Conclusions of Law in the Hearing Officer's Proposed Order, dismisses the complaint, and dismisses with prejudice the unfair labor practice charge.

It is so directed.

POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.

/s/SUE POHLER
CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order.

I certify that this document was filed and a copy served upon each party on this
12th day of February, 1999.

/s/LINDA S. HARDESTY
CERTIFIED LEGAL ASSISTANT

**STATE OF OHIO
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POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") on the exceptions and response to exceptions to the Hearing Officer's Proposed Order issued October 30, 1998. For the reasons below, we find that the State of Ohio, Department of Rehabilitation and Correction, Ross Correctional Institution ("Respondent") did not violate Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(3) when it denied an employee access to union representation and when it provided the employee with a negative performance evaluation.

I. BACKGROUND

The State of Ohio is a "public employer" as defined by O.R.C. § 4117.01(B), and the Department of Rehabilitation and Correction, Ross Correctional Institution is a political subdivision of the State. District 1199, Service Employees International Union, The Health Care and Social Service Union, AFL-CIO ("SEIU") is an "employee organization" as defined by O.R.C. § 4117.01(D) and is the exclusive representative for a bargaining unit that includes some of the Respondent's employees. SEIU and the State of Ohio are parties to a collective bargaining agreement ("Agreement") effective from 1997-2000; the

Agreement contains a grievance procedure that culminates in final and binding arbitration.

The Respondent's Standards of Employee Conduct, in effect at all relevant times, state: "Corrective counseling is always an option and may be utilized prior to any disciplinary action as well as between various steps of progressive discipline. Corrective counseling is a tool used to communicate, define expectations and provide an opportunity to achieve success. *A corrective counseling is not discipline.*" (emphasis added). Ms. Taylor acknowledged that the Respondent had provided her with a copy of the Standards of Employee Conduct. As stated in both the Standards of Employee Conduct and in the Agreement, the first step in the progressive discipline policy is an oral reprimand. Written memoranda of employee corrective counseling are kept in the immediate supervisor's files and in the deputy warden's files.

Jacquelyn D. Taylor is employed by the Respondent as a Registered Nurse 2 ("RN 2"). Ms. Taylor is a "public employee" as defined by O.R.C. § 4117.01(C) and is also a member of SEIU. The Health Care Administrator, Ms. Terry Jenkins, is Ms. Taylor's supervisor.

On or about January 13, 1997, Ms. Jenkins conducted an employee performance review of Ms. Taylor. In this performance review, Ms. Taylor received a rating of "above expectation" in the areas of Quantity of Work, Quality of Work, and Problem Solving/Decision Making. Ms. Taylor received a rating of "meets expectation" in the areas of Timeliness, Team Effort/Cooperation, Communicating, and Planning/Scheduling.

Ms. Taylor filed four grievances between May 19, 1997 and June 5, 1997. On June 3, 1997, Ms. Taylor filed an unfair labor practice charge against the Respondent. On November 3, 1997, Ms. Taylor and the Respondent entered into a settlement agreement resolving Ms. Taylor's June 3, 1997, unfair labor practice charge. On November 20, 1997, SERB dismissed the case pursuant to that settlement.

Cheryl Hart, Ross Correctional Institution's Deputy Warden of Special Services and

Ms. Jenkins' supervisor, had received complaints from numerous staff regarding Ms. Taylor's behavior while at work. Ms. Hart was aware that Ms. Jenkins had not addressed these issues due to her inexperience as a supervisor. When the complaints and incident reports came to Ms. Hart's attention, she told Ms. Jenkins to take care of the reports or be disciplined. Ms. Hart and Ms. Jenkins then met with the Warden. The Warden told Ms. Jenkins to use corrective counseling to address the accumulated incident reports.

In January 1998, Ms. Jenkins scheduled the corrective counseling of Ms. Taylor regarding several incident reports, medication reports, and other reports concerning Ms. Taylor's work. At that time, Ms. Taylor had an evaluation coming up and had not spoken to Ms. Jenkins for several months. Ms. Jenkins wanted to try to resolve the issues peaceably.

On or about January 8, 1998, Ms. Jenkins asked Ms. Taylor to come into her office for the corrective counseling. Ms. Jenkins asked Ms. Taylor to close the door so that the meeting would be private. Ms. Taylor asked for a union representative, but Ms. Jenkins denied this request, explaining that corrective counseling is not discipline and that Ms. Taylor did not need a union representative. Ms. Jenkins then informed Ms. Taylor of some areas of concern with her work, specifically with transcribing prescription orders incorrectly and sick call procedures. Some of the concerns involved life-threatening issues that could expose the Respondent to liability. Ms. Taylor stated that she was not the only one to blame for these incidents and that the doctor and pharmacy were also at fault. Ms. Jenkins asked Ms. Taylor to do the job she knew she was capable of doing and to quit trying to be perfect, because in doing so, she was making mistakes. Ms. Jenkins did not threaten to discipline Ms. Taylor during the meeting; in fact, they agreed to work together. The January 1998 corrective counseling was not placed in Ms. Taylor's personnel file.

On or about February 9, 1998, Ms. Jenkins conducted another employee performance review of Ms. Taylor. No employee performance reviews of Ms. Taylor were

conducted between January 13, 1997, and February 9, 1998. In this performance review, Ms. Taylor received a rating of “meets expectation” in the areas of Quantity of Work, Quality of Work, Timeliness, Problem Solving/Decision Making, and Planning/Scheduling. Ms. Taylor received a rating of “below expectation” in the areas of Team Effort/Cooperation and Communicating. Ms. Jenkins wrote on the performance evaluation, “When supervisor has attempted to speak with Nurse Taylor concerning several areas of concern, Nurse Taylor becomes defensive and demands a union representative, although she is always advised that she is only receiving corrective counseling.”

On March 11, 1998, Ms. Jenkins again called Ms. Taylor into her office for corrective counseling. The Department’s central office quality assurance nurse had conducted a review of the Ross Correctional Institution’s nurses’ charts and had cited Ms. Taylor’s charting as poor. During this meeting, Ms. Jenkins showed examples of Ms. Taylor’s incorrect charting. Ms. Taylor requested union representation at this meeting; Ms. Jenkins denied the request, explaining that she was only doing corrective counseling. Ms. Jenkins also gave Ms. Taylor a copy of an article entitled, “Seven Things You Should Never Chart.” Ms. Taylor was told that she should not “air dirty laundry,” refer to staffing issues, or make editorial or non-factual comments in patient charts. If a staff member needs to air concerns, other appropriate documents are available on which to record them, not on the patient’s chart. Ms. Taylor did not threaten to discipline Ms. Taylor during this meeting. The March 1998 corrective counseling was not placed in Ms. Taylor’s personnel file.

On or about March 12, 1998, Ms. Taylor wrote a derogatory comment in an inmate’s chart about what a physician had allegedly told the inmate. An investigatory interview was conducted with regard to this incident; Ms. Taylor had union representation at this meeting. Ms. Taylor received a written reprimand for this incident on or about April 2, 1998.

Ms. Taylor appealed her February 1998 performance review. The Respondent’s Personnel Officer, Sandy Price, granted Ms. Taylor’s appeal for the reason that Ms. Taylor

was not given 48 hours' written notice of the performance review and was not given the opportunity to meet with Ms. Jenkins before the actual scoring of the evaluation. Because these procedures were not followed, the February 1998 performance review was removed from Ms. Taylor's personnel file and a letter documenting the removal of the performance review was placed in her file.

II. ANALYSIS AND DISCUSSION

O.R.C. §§ 4117.11(A)(1) and (A)(3) state in relevant part as follows:

- (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
 - (1) Interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code[;]
 - * * *
 - (3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code[.]

A. **The Respondent Did Not Violate O.R.C. § 4117.11(A)(1) By Improperly Denying Union Representation**

O.R.C. § 4117.03(A)(3) guarantees public employees the right to "representation by an employee organization." In *In re Davenport*, SERB 95-023 at 3-156 (12-29-95) ("*Davenport*"), we adopted the standard in *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 88 L.R.R.M. 2689 (1975) ("*Weingarten*") and held as follows:

We believe that *Weingarten* provides the proper balance between the public employer's need to manage and the public employees' rights in O.R.C. § 4117.03(A)(2) to engage in concerted activities for mutual aid and protection. Therefore, we specifically find that, upon an employee's request, representation by an employee organization is required at investigatory interviews which the employee reasonably believes could lead to discipline (the *Weingarten* standard) and at grievance meetings.

In *In re City of Cleveland*, SERB 97-011 (6-30-97) ("*Cleveland I*"), we held that an O.R.C. § 4117.11(A)(1) violation for the denial of the right to representation is established when the following four elements are proven: (1) that the interview was investigatory;

(2) that the employee requested the presence of a union representative and the request was denied; (3) that the employee reasonably believed that the interview might result in discipline; and (4) that after the employer's denial of representation, the employer compelled the employee to continue with the interview.

A meeting is investigatory if its purpose is to elicit information pertaining to the conduct of the employee being interviewed. *Id.* The Respondent's announced purpose for the January 8, 1998 and March 11, 1998 meetings was to conduct corrective counseling sessions regarding accumulated incident reports about Ms. Taylor and regarding charting errors, respectively. In both situations, the Respondent had decided what it was going to do *before* the meeting was held. The timing of the Respondent's knowledge of both the incident reports and the charting errors, along with the decision to use corrective counseling, supports this finding. Thus, the first element was not established.

In the present case, Ms. Taylor requested union representation at both the January 8, 1998 meeting and the March 11, 1998 meeting. The second element, the request for representation by the employee involved, has never been in serious dispute. The meetings continued at Ms. Jenkins' insistence after the request for representation was made. Thus, the fourth element is also established.

An employee's reasonable belief that discipline may be imposed as a result of the interview will be measured by an objective standard: whether a reasonable person would believe that discipline may be imposed on the employee involved *as a result of* the interview. *Id.* It is irrelevant that no discipline actually resulted if the employee possesses the requisite reasonable belief that discipline might result. *See, e.g., Rock-Tenn Co. v. United Paper Workers Int'l Union, Local 907*, 315 N.L.R.B. 670, 148 L.R.R.M. 1148 (1994). The right to representation arises "when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or is being seriously considered," combined with an employee's knowledge of that purpose; without some statement of

purpose, the justification for the fear that the interview will be used for disciplinary purposes increases. *Cleveland I*, *supra* at 3-69 quoting *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 402, 410, 99 L.R.R.M. 2841, 2845 (9th Cir. 1978). General and unspecified concerns cannot substantiate reasonable belief by objective standards that discipline might result from the investigatory interview; otherwise, an employee could always argue that any time the employer questions an employee about work performance, a “threat” of discipline exists. *In re City of Cleveland*, SERB 97-017 (11-21-97) (“*Cleveland II*”). A “latent threat, without more, does not invoke the right to the assistance of a union representative.” *Id.* at 3-120, quoting *Alfred M. Lewis, Inc. v. NLRB*, *supra*.

According to the parties’ collective bargaining agreement, corrective counseling is not included in the progressive discipline policy. The Respondent’s own Standards of Employee Conduct acknowledge: “Corrective counseling is a tool used to communicate, define expectations and provide an opportunity to achieve success. *A corrective counseling is not discipline.*” (emphasis added). Even though a counseling is not discipline, an employer could use it punitively or to conduct an investigation into other possible wrongdoing. In this case, Ms. Taylor was told that the meeting was for a corrective counseling; the employer did not deviate from the meeting’s announced purpose. The corrective counseling sessions were not used as punishment against the employee, and they were not being used to conduct an investigatory interview. Consequently, Ms. Taylor could not reasonably believe that the counseling sessions might result in discipline. Thus, the third element is also not present. Since two of the four elements under *Cleveland I* have not been proven, the Respondent did not unlawfully deny the right to union representation in violation of O.R.C. § 4117.11(A)(1).

B. The Respondent Did Not Violate O.R.C. §§ 4117.11(A)(1) and (A)(3) By Discriminating Against the Charging Party

In *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 66 Ohio St.3d 485, 498, 1993 SERB 4-43, 4-49 (“*Adena*”), the Ohio Supreme Court articulated the “in part” test to be applied by SERB to determine whether an individual has been discriminated against on the basis of protected activity in violation of O.R.C.

§ 4117.11(A)(1) and (A)(3). The *Adena* standard mandates that SERB's primary focus be on the employer's motive. SERB interpreted and applied the Ohio Supreme Court's *Adena* opinion in *In re Fort Frye Local School Dist. Bd. of Ed.*, SERB 94-017, p. 3-104 (10-14-94) ("*Ft. Frye*"), and held that the *Adena* standard involves a three-step process:

(1) The Complainant must create a "presumption" of anti-union animus, by showing that the employer's action was taken to discriminate against the employee for the exercise of rights protected by O.R.C. Chapter 4117.

(2) The Respondent is then given the opportunity to rebut the presumption by presenting evidence that shows legitimate, nondiscriminatory reasons for its decision.

(3) The Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.

To make a prima facie case of discrimination under O.R.C. § 4117.11(A)(3), the Complainant must establish the following elements: (1) that the employee at issue is a public employee and was employed at relevant times by the Respondent; (2) that he or she engaged in protected activity under O.R.C. Chapter 4117, which fact was either known to the Respondent or suspected by the Respondent; and (3) that the Respondent took adverse action against the employee under circumstances which could, if left unrebutted by other evidence, lead to a reasonable inference that the Respondent's actions were related to the employee's exercise of protected concerted activity under O.R.C. Chapter 4117. *Id.*

The record supports the conclusion that a prima facie case has been established in this matter. Ms. Taylor is a public employee and is employed by the Respondent. Ms. Taylor filed four grievances and one unfair labor practice charge during the time between her 1997 and 1998 performance evaluations; both types of activities are protected under O.R.C. Chapter 4117 and were known by the Respondent to have occurred. The Respondent gave lower evaluation ratings to Ms. Taylor in 1998 after she engaged in protected activities.

The Respondent rebuts the presumption of antiunion animus by contending that it was motivated by the articulated concerns about Ms. Taylor's work performance. These

concerns were brought to the Respondent's attention through incident reports and complaints from co-workers, as well as the Department's central office quality assurance nurse. These concerns were also raised by Ms. Jenkins' own observations of Ms. Taylor's refusal to accept supervision in any form by Ms. Jenkins. Ms. Jenkins' testimony was uncontroverted on this point. We note that the hearing officer found Ms. Jenkins' testimony to be credible on this point, and the hearing officer observed the testimony of both Ms. Jenkins and Ms. Taylor about these meetings; on the issue of credibility, we must accept the hearing officer's findings.

Weighing all of the facts in this matter, we find by a preponderance of the evidence that the Respondent successfully rebutted the prima facie case in this matter. Thus, we find that the Respondent did not discriminate against Ms. Taylor in violation of O.R.C. §§ 4117.11(A)(1) and (A)(3) when it conducted the 1998 performance evaluation.

III. CONCLUSION

For the reasons above, we find that the State of Ohio, Department of Rehabilitation and Correction, Ross Correctional Institution did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(3) when it denied an employee access to union representation and when it provided the employee with a negative performance evaluation. As a result, we dismiss the complaint and dismiss with prejudice the unfair labor practice charge.

Gillmor, Vice Chairman, and Verich, Board Member, concur.